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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MEL M. MARIN,

Plaintiff,

v.

ESCONDIDO CARE, *et al*,

Defendants.

) Civil No.11cv1610 AJB (JMA)

)  
) **Order Dismissing Complaint for Failure**  
) **to State a Claim and Lack of Standing**  
) **and Denying as Moot Motion to Direct**  
) **Marshal to Serve**

) [Doc. Nos. 1 and 14]

On July 21, 2011, the Plaintiff, Mel M. Marin, a non prisoner proceeding *pro se*, filed a complaint against approximately twenty-four Defendants. In the instant Complaint, the Plaintiff alleges causes of action for conversion, fraud and deceit, intentional infliction of emotional distress, assault and battery, personal injury, deceptive trade practices, financial abuse, false representation, breach of fiduciary duty, violation of the civil rights act and wrongful death. The Plaintiff also filed a motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a)(1) and Local Civil Rule 3.2(a). On September 29, 2011, this Court denied Plaintiff's motion to proceed in forma pauperis because his motion failed to state an inability to pay costs or give security with particularity, definiteness, and certainty. Plaintiff was granted 30 days leave to pay the \$350.00 filing fee or to submit additional documentation regarding his economic status. On October 6, 2011, Plaintiff submitted additional documentation regarding his

1 economic status and the Court granted his motion to proceed in forma pauperis on December 12, 2011.  
 2 On May 21, 2012, Plaintiff filed a motion to direct Marshal to serve.

### 3 Discussion

4 A court may dismiss, sua sponte, the case at any time if it determines the plaintiff failed to state a  
 5 claim on which relief may be granted pursuant to § 1915(e)(2). *Barren v. Harrington*, 152 F.3d 1193,  
 6 1194 (9th Cir. 1998). “A plaintiff must allege facts, not simply conclusions, that show that an individual  
 7 was personally involved in the deprivation of his civil rights.” *Id.* A court will deny any motion that fails  
 8 to present a legal and factual basis. *Id.*

#### 9 ***I. Plaintiff’s First Cause of Action***

10 Plaintiff’s first cause of action alleges fraud was committed by Defendants, Escondido Care  
 11 Center, MEK Escondido L.L.C., Edward Keh, Lawrence Keh, Martha Keh, and Donald Wheeler.  
 12 Plaintiff alleges fraud on behalf of his deceased mother and himself. Plaintiff asks for relief in the  
 13 amount of \$84.8 million dollars from each Defendant on behalf of his deceased mother. Plaintiff also  
 14 seeks \$12 million dollars from each Defendant on his own behalf.

15 As a preliminary matter, the Court will first address whether Plaintiff has standing to sue on  
 16 behalf of his deceased mother. Capacity to sue is governed by Federal Rule of Civil Procedure 17(b),  
 17 which provides that, for an individual acting in a representative capacity, “capacity to sue or be sued  
 18 shall be determined by the law of the state in which the district court is held.” *See* Fed. R. Civ. P. 17(b).  
 19 Under California law, only a decedent’s personal representative or successor in interest may bring an  
 20 action on the decedant’s behalf. *See* Cal. Civ. Proc. § 377.30. A person who seeks to commence an  
 21 action as the decedant’s successor in interest must, under California law, file an affidavit or a declaration  
 22 under penalty of perjury under the laws of California. *See* Cal. Civ. Proc. § 377.32. The affidavit or  
 23 declaration must state the decedant’s name, time and place of death, and must aver that no proceeding is  
 24 now pending in California for administration of the decedent’s estate. *Id.* The affidavit or declaration  
 25 must also state that the declarant is the decedent’s successor in interest and succeeds to the decedent’s  
 26 interest in the action or proceeding and that no other person has a superior right to commence the action  
 27 or proceeding or to be substituted for the decedent in the pending action or proceeding. *Id.* A certified  
 28 copy of the death certificate must be attached to the affidavit. *Id.* “The party seeking to bring a survival

1 action bears the burden of demonstrating that a particular state's law authorizes a survival action and that  
 2 the plaintiff meets that state's requirements for bringing a survival action.” *Moreland v. Las Vegas*  
 3 *Metropolitan Police Dept.*, 159 F.3d 365, 369 (9th Cir. 1998) (quoting *Byrd v. Guess*, 137 F.3d 1126,  
 4 1131 (9th Cir. 1998)). Here, Plaintiff’s complaint fails to address the state law requirements or whether  
 5 they have been fulfilled in this action. Plaintiff has also failed to include an affidavit or declaration  
 6 containing any of the statements required by California law or include a certified copy of the death  
 7 certificate. Accordingly, Plaintiff has no standing to sue on behalf of his deceased mother.

8 The Plaintiff also asserts claims on his own behalf. Under Federal Rule of Civil Procedure 9(b),  
 9 allegations of fraud must be plead with particularity. *See* Fed.R.Civ.P. 9(b). Rule 9(b) requires that,  
 10 when fraud is alleged, “a party must state with particularity the circumstances constituting fraud. . .” *Id.*  
 11 Any averments which do not meet that standard should be “disregarded,” or “stripped” from the claim  
 12 for failure to satisfy Rule 9(b). *Id.* “Averments of fraud must be accompanied by ‘the who, what, when,  
 13 where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th  
 14 Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)).

15 In Plaintiff’s allegations for fraud against the Defendants he claims that Escondido Care Center  
 16 “committed deliberate fraud against Mother and Son by telling them Mother would be allowed  
 17 acupuncture treatments whenever son wanted them, when they knew they would stop allowing that care  
 18 whenever they felt like it.” *Pl. ‘s Compl.* 23, Doc. No. 1. In his allegations Plaintiff has failed to give the  
 19 who, what, when, where and how, of the misconduct charged. Plaintiff has failed to state with particular-  
 20 ity the circumstances constituting fraud. He fails to state the circumstances surrounding any promises  
 21 made by Escondido Care Center, who gave him these promises, how the promises were given, when the  
 22 promises were given, and where the promises were given. Accordingly, this Court finds that Plaintiff  
 23 lacks standing and fails to state a claim in his first cause of action.

## 24 ***II. Plaintiff’s Second and Third Causes of Action***

25 Plaintiff’s second cause of action asserts intentional infliction of emotional distress, personal  
 26 injury, assault and battery against Escondido Care Center, MEK Escondido, L.L.C., Edward Keh,  
 27 Lawrence Keh, and Donald Wheeler. *Pl. ‘s Compl.* 28, Doc. No. 1. Plaintiff’s third cause of action  
 28 asserts financial abuse, deceptive practice against senior citizens, and conspiracy against the same

1 Defendants. *Id.* at 31. Plaintiff sues on behalf of his mother and asks for \$94.8 million in relief from  
 2 each Defendant for the second cause of action and \$9,000 from each Defendant for the third cause of  
 3 action. *Id.* at 28, 31.

4 As stated above, the Plaintiff has failed to demonstrate standing to sue on behalf of his deceased  
 5 mother. Plaintiff's complaint fails to address the state law requirements and include an affidavit  
 6 containing any of the statements required by California law or a certified copy of the death certificate.  
 7 Accordingly, this Court finds that Plaintiff has no standing to sue on behalf of his deceased mother.

### 8 ***III. Plaintiff's Fourth, Fifth, Sixth and Seventh Causes of Action***

9 Plaintiff's fourth cause of action alleges battery, breach of fiduciary duty and violation of the  
 10 Civil Rights Act against Defendants: Dr. Raymond Dann and Palomar Hospital on behalf of his  
 11 deceased mother. *Pl. 's Compl.* 32-33, Doc. No 1. Plaintiff's fifth, sixth, and seventh causes of action  
 12 assert the tort of conversion against numerous Defendants. *Id.* at 34. Plaintiff seeks relief in the amount  
 13 of \$94.8 million dollars, plus interest, from each Defendant on each cause of action on behalf of his  
 14 deceased mother. *Id.* As stated above, the Plaintiff has not demonstrated standing under California law  
 15 to sue on behalf of his deceased mother.

16 Additionally, Plaintiff also seeks relief in the amount of \$12 million dollars from each Defendant  
 17 on behalf of himself under the fifth, sixth and seventh causes of action for "conversion of son's power to  
 18 help his mother." *Id.* at 34. Under California law, conversion is the wrongful exercise of dominion over  
 19 another's personal property in denial of or inconsistent with his rights in the property. *In re Emery*, 317  
 20 F.3d 1064, 1069 (9th Cir. 2003). "The elements of conversion are (1) the plaintiff's ownership or right to  
 21 possession of the property; (2) the defendant's conversion by wrongful act inconsistent with the property  
 22 rights of the plaintiff; and (3) damages." *Id.* Here, Plaintiff claims that by accepting his sister's power of  
 23 attorney regarding their mother, rather than his own, the Defendants committed conversion. *Pl. 's*  
 24 *Compl.* 34, 35, 37, Doc. No. 1. The Plaintiff has failed to explain or provide case law explaining how a  
 25 power of attorney is a right to possession of property under the elements of conversion. He has also  
 26 neglected to explain how he was damaged by the acts of Defendants. He simply provides vague  
 27 conclusions. Therefore, the Court finds that Plaintiff lacks standing regarding causes of action four  
 28 through seven, and that Plaintiff fails to state a claim regarding causes of action five through seven.

1 ***IV. Plaintiff's Eighth and Ninth Causes of Action***

2 Plaintiff's eighth and ninth causes of action allege violation of the Civil Rights Act by numerous  
 3 Defendants. *Pl. 's Compl.* 38-39, Doc. No 1. Plaintiff claims that his mother's rights were violated  
 4 when Defendants honored his sister's power of attorney regarding their mother, instead of his own. *Id.*  
 5 at 21-22. Plaintiff is seeking \$94.8 million dollars in relief from each Defendant for each cause of  
 6 action on behalf of his deceased mother. *Id.* at 38-40. First, Plaintiff fails to explain what specific rights  
 7 were violated and how they were violated by each Defendant. Second, as explained above Plaintiff lacks  
 8 standing, under California law, to sue on behalf of his deceased mother unless he is her personal  
 9 representative or successor in interest. *See* Cal. Civ. Proc. § 377.30. Plaintiff has failed to address the  
 10 state law requirements and include an affidavit or declaration as required by California law. *Id.*  
 11 Therefore, the Court find that Plaintiff lacks standing and fails to state a claim in causes of action eight  
 12 and nine.

13 ***V. Plaintiff's Tenth Cause of Action***

14 Plaintiff's tenth cause of action alleges battery and wrongful death by all Defendants incorpo-  
 15 rated in Plaintiff's Complaint. *Pl. 's Compl.* 40, Doc. No 1. As explained above, Plaintiff does not have  
 16 standing to sue on behalf of his deceased mother. However, Plaintiff does have standing to bring an  
 17 action for the wrongful death of his mother. *See* Cal. Civ. Proc. § 377.60. A wrongful act or negligence  
 18 of another resulting in the death of a person creates a cause of action for wrongful death. *Id.* However, in  
 19 Plaintiff's Complaint, he fails to state facts supporting his claim that each Defendant of the twenty-four  
 20 Defendants in this action committed a wrongful or negligent act which resulted in the death of his  
 21 mother. Plaintiff simply states vague conclusions that each Defendant is liable for his mothers death. *Pl.*  
 22 *'s Compl.* 41, Doc. No 1. The Court therefore finds that the Plaintiff's tenth cause of action fails to state  
 23 a claim.


24 **Conclusion**

25 For the reasons set forth above, the Court finds that Plaintiff has failed to demonstrate he has  
 26 standing to bring causes of action one through ten on behalf of his deceased mother and in causes of  
 27 action one, and four through ten, the Plaintiff's complaint fails to state a claim. This Court therefore,  
 28 **DISMISSES** Plaintiff's Complaint **WITHOUT PREJUDICE** and with **LEAVE TO AMEND**. The

1 Plaintiff has thirty (30) days from the date of this Order to file an amended Complaint correcting the  
2 deficiencies noted herein. Failure to do so will result in the Court's dismissal of this case. Having  
3 dismissed the Complaint, the Court **DENIES AS MOOT** Plaintiff's Motion to Direct Marshal to Serve,  
4 [Doc. No. 14].

5 IT IS SO ORDERED.

6  
7 DATED: May 29, 2012

8   
9 Hon. Anthony J. Battaglia  
U.S. District Judge